98-755

No.

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IN THE

Supreme Court of the United States

October Term, 1998

EMILE HADDAD,

Petitioner,

v.

VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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30pp

QUESTIONS PRESENTED FOR REVIEW

Question 1: Whether Petitioner's age discrimination case grounded on direct evidence was improperly adjudicated by the district and Fourth Circuit courts in a manner inconsistent with relevant decisions of this Court and other circuit courts of appeal, as specified in the following subsidiary questions:

(a) What is the proper paradigm for adjudicating individual disparate treatment single-motive claims grounded on direct evidence, an unsettled question arising from this Court's 1985 *Thurston* holding, and generating since conflicting decisions among the circuits; and accordingly,

(b) whether the Fourth Circuit's paradigm for adjudicating said direct evidence claims is proper; and whether Petitioner was denied a substantial right at every stage of the adjudication of his claims under said paradigm; specifically,

(c) whether the Fourth Circuit Court of Appeals erred by affirming the district court orders (i) granting defendant partial summary judgement, (ii) denying plaintiffs' post-verdict motions for judgment amendment or new trial, and (iii) substituting the jury's split findings with its own judgment for defendant; all decided under said paradigm.

Question 2: Notwithstanding Question 1 on legal paradigm propriety, whether the Fourth Circuit court erred in affirming the district court's decision, rendered after having determined that the jury's split findings were inconsistent and not fully supported by the evidence, to reverse finding for plaintiff while allowing finding for defendant to stand, rather than order a new trial.

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STATUTES

Age Discrimination in Employment Act ("ADEA"),
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OPINIONS BELOW

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

1. The opinion of the United States Court of Appeals for the Fourth Circuit appears in Appendix F pp 54-59, and is unpublished.

2. The opinion of the United States District Court for the Eastern District of Virginia appears in Appendix D-E pp 44-53, and is unpublished.

3. The opinion of the United States District Court for the Eastern District of Virginia appears in Appendix B-C pp 9-43, and is unpublished

JURISDICTION

This is a petition for review on writ of certiorari of a decision by the United States Court of Appeals for the Fourth Circuit entered on August 6, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

STATUTORY PROVISIONS INVOLVED

The claims remaining in this case are brought under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.A. §§ 621-634.

STATEMENT OF THE CASE

Parties, Claims, and Forum

This action a was brought by Plaintiff-Petitioner, in the federal District Court for the Eastern District of Virginia, Alexandria Division, (Fourth Circuit), under the Age Discrimination in Employment Act ("ADEA")[1], against the Defendant-Respondent, Virginia Polytechnic Institute and State University, who employed Plaintiff as Associate Professor of Computer Science for eight years, and terminated his employment in 1995 at age 55. For the last three years of his employment, Plaintiff's immediate supervisor was Dr. William Frakes ("Frakes"), Program Director at the University's Northern Virginia Center where Plaintiff worked.

The complaint asserted that the Defendant discriminated against Plaintiff because of his age and retaliated against him because Plaintiff engaged in protected conduct opposing discrimination, as manifested in various adverse actions of discrimination and retaliation, including denial of equitable employment conditions, discharge, refusal to rehire, denial of wages, and denial of favorable letters of reference for future employment.

Summary Judgment: The Evidence and Legal Standards

Defendant supported its motion for summary judgment by a memorandum alleging that Plaintiff failed to carry his burden of

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[1] The Complaint contained additional due process and state law claims that were eventually dismissed without prejudice because of the Defendant's Eleventh Amendment immunity as a state agency.

proof according to the burden-shifting scheme of proving discrimination prescribed in *McDonnell Douglas*[2], citing Fourth Circuit case law authorities which require the burden of proving discrimination or retaliation to remain with plaintiff at all times. Plaintiff's opposition memorandum presented direct evidence of the age discriminatory intent of his immediate superiors and decision makers, in the form of documentary statements and oral statements explicitly revealing the ageist animus. One item of documentary direct evidence of age discrimination (entered later into trial evidence) is a letter form Plaintiff's immediate supervisor (Frakes) to the College Dean expressing his desire and intention to hire "young faculty" for the open positions in his Program for the Fall of 1995; to which Plaintiff applied and was refused by Frakes, and an applicant aged 29 was hired instead. This constitutes Plaintiff's complaint claim of "Discriminatory Refusal to Rehire". The complaint also asserted a claim of "Retaliatory Refusal to Rehire" supported by another item of documentary direct evidence of retaliation (also entered into trial evidence): an electronic mail in June 95 from Frakes to the College Dean which directly links the cause of Frakes's unwillingness to hire Plaintiff in the Fall of 1995 to Plaintiff's claiming age discrimination, in which Frakes says:

> It looks like he [Plaintiff] may be planning to claim age discrimination. I need direction from the university about how to proceed. It seems to me that we should, under no circumstances, offer him a teaching position in the fall [of 1995]. (Emphasis added).

The transcript of the hearing on the motion for summary judgment shows that the presiding judge repeatedly characterized documentary direct evidence introduced by Plaintiff as "smoking gun" evidence. (See e. g. *Appendix* page 37, line 17). Numerous

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[2] *McDonnell Douglas Corp. v. Green*, 93 S Ct 1817 (1973).

other oral statements by Plaintiffs supervisors directly evidencing age bias were also presented (See boldface statements in *Appendix* pp 1, 4, 5).

Plaintiff's opposition memorandum also asserted that, because of the availability of direct evidence of the unlawful motive, the *McDonnell Douglas* paradigm advocated by the Defendant is inapplicable to this case, citing the Supreme Court holding in *Thurston*[3]:

> [T]he McDonnell Douglas test is inapplicable where plaintiff presents direct evidence of discrimination. . . . .The shifting burdens of proof set forth in McDonnell Douglas are designed to assure that the Plaintiff [has] his day in court despite the unavailability of direct evidence.

Despite the availability of direct evidence of the unlawful motives, the court applied the legal standards of the *McDonnell Douglas* paradigm, maintaining that burden of proof remains with Plaintiff at all times. (This district court in the Fourth Circuit maintained that the burden of proof remains with Plaintiff throughout the adjudication of this case, which is in compliance with the Fourth Circuit law for this case, as elaborated in the Argument Section of this petition). The court decided to dismiss some of Plaintiff's claims, and ordered the case go forward on the remaining discrimination and retaliation claims.

Trial

Throughout the trial, the court adjudicated the case according to the McDonnell Douglas paradigm, sustaining its earlier position at summary judgment, that Plaintiff should bear the burden of proofing "but for" causation at all times, and that the Defendant

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[3] *Transworld World Airlines v. Thurston*, 469 US 121 (S Ct 1985).

should only have the production burden of offering legitimate nondiscriminatory reasons for its adverse actions against Plaintiff. The record shows that at the outset of the trial the court addressed the litigants and the jury on more than on occasion saying: "the plaintiff has the burden of proof ...." The same admonition was repeated in the middle of the trial and at the end. The Fourth Circuit dictates that persuasion remains plaintiff's burden in cases like this one, (see Argument Section).

At the end of the trial the jury findings were mixed. The jurors found unanimously that the Defendant retaliated against Plaintiff on one of the claims but did not find unanimously for him on the other claims[4].

Post-Trial Adjudication

In post trial motions, Plaintiff argued that the court's decisions affecting the verdict, (judgment as a matter of law, amendment of judgment), should be guided not by the McDonnell Douglas standards, but rather by the so-called "same-decision defense" model prescribed by many other circuits, which allocates to the defendant the burden of persuading the trier of the fact that the defendant would have taken the same adverse action against the plaintiff absent the wrongful motive. Plaintiff reasoned to the court that, in addition to the direct evidence of the unlawful intent, the court had a jury finding thereof, and that its post-verdict examination of the evidence should focus on whether the defendant offered and succeeded in a same-decision defense. Plaintiff motioned the court to amend the jury verdict accordingly and find for him on all claims. In the alternative, Plaintiff argued that the

[4] The jurors were not polled on the claims of the verdict.

jury's split findings were inconsistent and not fully (i.e. with respect to all claims) supported by the evidence, which are grounds for ordering a new trial. The Defendant, in support of its motion for judgment as a matter of law, also argued that the jury findings were inconsistent and not fully supported by the evidence, and alleged that Plaintiff did not meet his burden of proof under the McDonnell Douglas scheme. In response to the parties' motions, the court reversed the jury finding for Plaintiff and allowed the finding for the Defendant to stand. In the *Memorandum Opinion* explaining its decision, the court found the jury findings to be inconsistent and not fully supported by the evidence, and renewed its reliance on the McDonnell Douglas burden allocation scheme in judging the parties' evidential tasks. (See *Memorandum Opinion, Appendix* page 52 line 3). The court denied Plaintiff's motion for a new trial.

Appeal

Plaintiff appealed to the Fourth Circuit from the District Courts' orders dismissing with prejudice his due process claims, dismissing on summary judgment some of his ADEA claims, denying his motions to amend judgment or for a new trial, and granting Defendant's post-trial motion for judgment as a matter of law. In an unpublished, unbinding, per curiam opinion, decided on "informal briefs" and without oral arguments, the appeals court affirmed all the decisions of the lower court except for modifying the dismissal of the due process claims to be without prejudice.

REASONS FOR GRANTING WRIT

Reasons for Allowance of Writ on Question 1

The following are the reasons for granting the petition on Question 1 presented for review, stated on page (i):

1. The United States Court of Appeals for the Fourth Circuit has entered a decision in this case based on its legal standard for employment discrimination cases grounded on direct evidence which is (a) inconsistent with a relevant decision of this Court and, (b) in conflict with decisions of most other courts of appeals.

2. The question, at issue in this case, of what legal standard is applicable to single-motive discrimination cases grounded on direct evidence, addressed only in the negative by the *Thurston*[5] Court in 1985, has not yet been settled by this Court.

The forgoing reasons are explained and amplified in the following paragraphs.

The question of legal standards and scenarios for adjudicating employment discrimination cases ("adjudication paradigms") has been an important question of federal law that has generated over the past three and half decades substantial Supreme Court law in such seminal cases as *McDonnell Douglas*[6], *Burdine* [7], and *Hicks*[8] for individual single-motive disparate treatment circumstantial evidence cases; *Teamsters*[9] for pattern and practice,

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[5] *Trans World Airlines Inc. v. Thurston*, 105 S Ct 613 (1985).
[6] *McDonnell Douglas Corp. v. Green*, 93 S Ct 1817 (1973).
[7] *Texas Depart. of Community Affairs v. Burdine*, 101 S Ct 1089 (1981).
[8] *St. Mary's Honor Farm v. Hicks*, 113 S Ct 2742 (1993).
[9] *International Brotherhood of Teamsters v. United States*, 97 S Ct 1843 (1977).

or systemic, cases; *Wards Cove*[10] *and Hazen Paper*[11] for disparate impact cases; and *Price Waterhouse*[12] for mixed motive cases. One scenario that so far has no guiding Supreme Court definitive precedent is that of the individual plaintiff in a single-motive disparate treatment case grounded on direct evidence. Although the Court, in *Thurston*[13], debunked the relevancy of the McDonnell Douglas paradigm to these cases, it did not prescribe the specifics of the applicable legal scenario or delineate the litigants' burdens therein. Several, but not all, circuits have been addressing this question over the past 15 years and developing relevant case law at a relatively slow pace. This is because discrimination cases producing direct evidence of the discriminatory or retaliatory intent are relatively rare, due to the inherent difficulty of proving state of mind, as noted by the Supreme Court in *Aikens*[14]: "there will seldom be 'eyewitness' testimony as to the employer's mental processes." The circuits that have addressed this question are not in full agreement, with notable dissent by the Fourth Circuit, where this case stands. Accordingly, this case is an opportune one for the Court to hear and settle an important question of federal law.

The adjudication paradigm of employment discrimination cases grounded on circumstantial evidence of disparate treatment of individual plaintiffs by a defendant solely motivated by the wrongful animus is governed by the Court's holdings in *McDonnell Douglas*[6], *Burdine*[7] and *Hicks*[8] ("McDonnell Douglas Paradigm"). The Court in *Thurston*[5] held that the McDonnell Douglas formula is

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[10] *Wards Cove Packing Co. v. Antonio*, 109 S Ct 2115 (1989).
[11] *Hazen Paper Co. V. Biggins*, 113 S Ct. 1701 (1993).
[12] *Price Waterhouse v. Hopkins*, 109 S Ct 1775 (1989).
[13] *Trans World Airlines Inc. v. Thurston*, 105 S Ct 613 (1985), an ADEA case dealing with the statute's bona fide occupational qualification defense, and with the matter of liquidated damages.
[14] *U. S. Postal Service Board of Governors v. Aikens*, 103 S Ct 1478, 1482 (1983).

inapplicable where the plaintiff presents direct evidence of the wrongful motive:

> [T]he McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination.....The shifting burdens of proof set fourth in McDonnell Douglas are designed to assure that the plaintiff [has] his day in court despite the unavailability of direct evidence.[15]

The *Thurston* Court, however, did not provide guidance on how to adjudicate claims supported by direct evidence, a question not yet settled by the Court. Lower courts had already begun to deal with direct evidence claims before *Thurston* was decided, and many more have done so since. The consensus of the First, Second, Third, Fifth, Seventh, Eight, and Eleventh Circuits (and lower courts in other circuits) is that a defendant confronting a prima facie claim based on direct evidence can avoid liability only if it shoulders the *burden of proving* what is known as the *same decision* defense: that it would have decided on the same adverse action absent the unlawful motive. *Accord Holifield v. Reno*, 115 F 3d 1555, 1561 (11th Cir. 1997); *Bodenheimer v. PPG Industries, Inc.*, 5 F 3d 955, 958 (5th Cir. 1993); *Barbano v. Madison County*, 922 F 2d 139 (2nd Cir. 1990); *Perry v. Kuntz*, 878 F 2d 1054, 1061 (8th Cir. 1989); *Lusardi v. Xerox Corp.*, 855 F 2d 1062 (3rd Cir. 1988); *Fields v. Clark University*, 817 F 2d 931, 936 (1st Circ. 1987); *Bibbs v. Block*, 778 F2d 1318, 1324 (en banc) (8th Cir. 1985); *Blalock v. Metals Trades, Inc.*, 775 F 2d 703 (6th Circ. 1985); *Buckly v. Hospital Corp. of America, Inc.*, 758 F 2d 1525 (11th Circ. 1985); *Lee v. Russell County Board of Education*, 604 F 2d 769, 774 (11th Cir. 1982). Cf. *Mt. Healthy School District v. Doyle*, 429 US 274, 287 (1977).

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[15] *Trans World Airlines, Inc. v. Thurston*, 469 US at 121 (quoting *Loeb v. Textron, Inc.* 600 F2d 1003, 1014 (CA1 1979)).

The Fourth Circuit is perhaps the only court of appeals that prescribes applying the *McDonnell Douglas/Burdine* paradigm in adjudicating single-motive claims supported by direct evidence, a practice in direct conflict with *Thurston*; and does not subscribe to shifting the persuasion burden to the defendant, a position in conflict with the other circuits. In *Mullen*[16], the Fourth Circuit declares:

> [T]his court has employed the Burdine analysis whether a plaintiff brings direct or indirect proof of his claim of discrimination.....Whether the plaintiff attempts to prove intentional discrimination by direct or indirect evidence, "the burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all time with the plaintiff" (quoting *Burdine*).

In another Fourth Circuit opinion[17], the burden of persuasion remained with plaintiff who introduced direct evidence of discrimination in the form of racial slurs directed at him by decision maker. In yet another opinion, the Fourth Circuit rejects departing from *Burdine* when direct evidence proves the unlawful discrimination:

> [Plaintiff] contends that once she proves by direct evidence that unlawful discrimination was a motivating factor in the employment decision" the defendant must *prove* "that the same decision would have been made absent the determination" (quoting *Fields v. Clark University*, 817 F 2d 931, 937, (1st Cir. 1987). This shifts the burden to the Defendant contrary to *Burdine*.

Dwyer v. Smith 867 f 2d 184 (4th Cir. 1989). Other circuits, heeding the Supreme Court holding in *Thurston*, have held that, in the words of the Eighth Circuit:

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[16] *Mullen v. Princess Ann Volunteer Fire Depart.*, 853 F2d 1130 (4th Cir. 1989).
[17] *Abasiekong v. City of Shelby* 744 F 2d 1055 (4th Cir. 1984).

> If the plaintiff presents no direct evidence of discrimination the [*McDonnell Douglas*] burden shifting analysis is followed. . . . If the plaintiff offers direct evidence of age discrimination, however, the *McDonnell Douglas* analysis is inapplicable (citing *Thurston*). That is, when direct evidence of discrimination exists, the plaintiff need not establish a prima facie case because creating an inference of discrimination is unnecessary.

Bashara v. Black Hills Corporations, 26 F 3d 820 (8th Cir. 1994).

Thus, the decisions of the Fourth Circuit and its district courts, for individual disparate treatment single-motive direct evidence cases, that are based on the *McDonnell/Burdine/Hicks* paradigm prescribed by the Fourth Circuit for such cases, are in conflict with *Thurston* and the decisions of most other circuits. This conflict has existed for about the past 15 years. Considering the substantially diminished legal advantage that the Fourth Circuit paradigm brings to a case compared to the same-decision defense paradigm of the other circuits, and arguing that the Fourth circuit paradigm is improper, a good deal of Fourth Circuit plaintiffs may have been denied substantial rights and suffered injustice, an ongoing practice which can be alleviated by this Court's intervention.

The prejudice to this Petitioner of having to adjudicate his claims so far under the Fourth Circuits paradigm has adversely affected all stages of his litigation: summary judgment, trial, post-trial litigation, and appeal; because the paradigm was used at all stages to guide the courts decisions, in addition to guiding the conduct of the trial. It is well recognized that summary judgement is seldom available for a defendant confronting a plaintiff presenting direct evidence, and may in fact be available instead for the

plaintiff. In this case, Petitioner argues that the District Court erred by applying the McDonnell Douglas paradigm in granting partial summary judgment to the Defendant while acknowledging the "smoking gun" documentary direct evidence of discrimination presented by Plaintiff.

Throughout trial, Plaintiff was substantially prejudiced by the courts' adoption of the same paradigm, prescribed by the Fourth Circuit. In post-trial decisions a court looks to the burdens of the litigants as prescribed by the paradigm, to decide on pre- and post-verdict judgment as a matter of law, verdict viability, judgment amendment, or new trial. In post-trial motions of this case, Petitioner argued that the District Court erred by using the McDonnell Douglas paradigm, despite Plaintiff's motion to the contrary, in assessing the litigants burdens to reach its own decision of substituting the jury's finding for Plaintiff by a judgment for the Defendant. On appeal, the Fourth Circuit Court erred in applying the same paradigm to conclude that Plaintiff failed "to present evidence rebutting Virginia Tech's non-discriminatory explanation for its actions" and "to meet his ultimate burden of showing that Virginia Tech had a retaliatory motive;"[18] when the burden should properly have been shouldered by the Defendant to prove a same-decision defense believable to the judge at summary judgment, to the jury at trial, to the judge in post-verdict decisions, and to the appeals court. Accordingly, this Petitioner argues that he has been prejudiced and denied a substantial right, at every stage, and cumulatively, in the adjudication of his case under the Fourth Circuit paradigm.

[18] See Opinion of the Fourth Circuit, Appendix F pp57-58

Reasons for Allowance of Writ on Question 2

The following are the reasons for granting the petition on Question 2 presented for review, as stated on page (i):

The United States Court of Appeals for the Fourth Circuit has entered a decision in this case sanctioning the lower court's decision which so departs from well established judicial principles with respect to the interrelated issues of inconsistent and evidence-unsupported verdicts, judgment as a matter of law, and new trials; and conflicts with the Fourth Circuit's own precedents; as to call for an exercise of this Court's supervisory power. The forgoing reasons are explained and amplified in the following paragraphs.

Although this question addresses the issues of post-verdict decisions by the District Court and the Fourth Circuit, which were also addressed by Question 1 in relationship to the adjudication paradigm which affected all stages of the litigation of this case; this question presents an independent reason for granting the writ of certiorari. Notwithstanding the argued impropriety of the paradigm, the district and appeals courts still erred in their decisions on the post verdict motions.

The jury returned a split verdict, finding in part for Plaintiff and in part for the Defendant. In post-verdict motions, both parties argued to the court that the jury verdict findings were inconsistent. In its *Memorandum Opinion* on the post trial motions before it, the court determined that indeed the jury findings were inconsistent:

> Moreover, we note that the jury's finding on this claim is inconsistent with its findings of no retaliation on all of plaintiff's other claims. Accordingly, defendant's motion [for judgment as a matter of law] will be granted on this basis. (Emphasis added).

Memorandum Opinion (*Appendix* p 52). It is a well established judicial principle that inconsistent jury findings should not be a basis for granting judgement as a matter of law, and that the proper remedy for inconsistent verdicts is new trial and not judgement as a matter of law. This principle is advocated by the Fourth Circuit. See, e.g. *Atlas Food Systems and Services, Inc. v. Crane National Vendors, Inc.*, 99 F 3d 587 (4th Cir. 1996). This is especially so when the nonmoving party bears the burden of proof, (the Plaintiff in this case, who appeals in Question 1 from the impropriety of this burden allocation).

The impropriety of the court's decision to allow the jurors verdict to stand on some, but not all findings, can be seen from a simple analysis which follows from the Supreme Court holding in *Anderson v. Liberty Lobby Inc.*, 106 S Ct 2505 (1986) about the role of the judge considering a motion for directed verdict by the defendant:

> [The] judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.....The Judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to verdict. (Emphasis added).

Since the judge reversed the unanimous verdict returned by the jurors for the Plaintiff on the evidence presented for one of the claims, the judge must have determined that non of the jurors was fair-minded and reasonable, an unavoidable inference from the Supreme Court's holding in *Anderson*. (Because if there were only one reasonable juror, the unanimous verdict for the Plaintiff would not be returned). Despite this alarming conclusion about the fitness of the jurors to render a just verdict, the judge was willing to allow

their other verdict findings to stand, as stated in the judge's *Memorandum Opinion*: "For these reasons allowing the verdict to stand represents neither a clear error nor manifest injustice." (*Appendix* page 48).

The impropriety of not ordering a new trial in this case is clearly indicated by the Fourth Circuit's own authority in *Wyatt v. Interstate & Ocean Transp Co.*, 623 F 2d 888 (4th Cir. 1980), cited in the court's own *Memorandum Opinion*:

> Alternatively, plaintiff asks the Court for a new trial pursuant to Fed. R. Civ. P. 59(a). The standard governing a district court's consideration of a motion for a new trial was set forth in *Wyatt v. Interstate & Ocean Transp Co.*, 623 F 2d 888 (4th Cir. 1980). In that decision, the Fourth Circuit stated that a trial court may weigh the evidence and consider the credibility of the witnesses, and that it has a duty to set aside a verdict *and* grant a new trial, even if the verdict is supported by substantial evidence, if the court finds that it is against the clear weight of the evidence, based on false evidence, or will result in a miscarriage of justice. See id at 891. (Emphasis added).

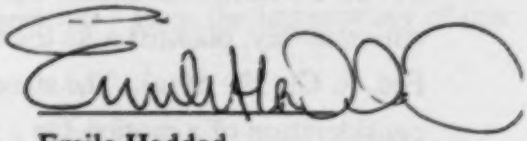
The court acknowledged that it found the verdict not fully supported by the evidence: "[T]he Court finds the evidence did not support the jury's finding [for Plaintiff]" (*Memorandum Opinion*, Appendix p 52), and accordingly it set aside the verdict, but it did not comply with its "duty" to order a new trial as dictated by the Fourth Circuit law.

On appeal, the Fourth Circuit sanctioned the District Court's decision, thereby disregarding its own authority in *Atlas* and *Wyatt*. This represents a notable departure "from the accepted and usual course of judicial proceedings.....as to call for an exercise of this Court's supervisory power." *Supreme Court Rule 10(a).*

CONCLUSION

For all the forgoing reasons, petitioner requests the Court to grant his petition for writ of certiorari.

Respectfully submitted,



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APPENDIX
TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

SWORN STATEMENT OF FACTS
OF PRO SE PLAINTIFF EMILE HADDAD
Filed as part of Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment

1. I was employed by the University for 8 years from September 1, 1987 until August 15, 1995, as a faculty member of the Department of Computer Science ("Department") assigned to the Computer Science Program ("Program") at the Northern Virginia Graduate Center ("Center") in Fairfax County, Virginia.

2. In the Summer of 1987, I was interviewed for employment by Csaba Egyhazy ("Egyhazy"), the Program Director, and Donald Allison ("Allison"), the Department Head. Although I asked for a tenured regular faculty appointment, Allison and Egyhazy indicated that there was then no opening for a regular appointment, and offered instead a temporary visiting appointment, at the rank of Associate Professor, which I accepted. I was then 47 years old. The appointment was for the period September 1, 1987 to May 31, 1988, corresponding to the Academic Year ("AY") 87-88. An Academic Year extends over two Semesters belonging to two years: The Fall Semester of the first year and the Spring Semester of the following year. My immediate supervisor was Egyhazy, as Program Director.

In that year, the other Program faculty were, Paul Roth ("Roth") and Bruce Orcutt ("Orcutt") and the Program Director, Egyhzy. During a meeting in Egyhazy's office, Egyhazy told me that Orcutt was denied tenure and termniated. In response to my question about the reason, Egyhazy said that "**he [Orcutt] is an excellent teacher, but the Department in Blacksburg thinks that the average age of the Program faculty is too high**", and referred to his age, Orcutt's age, Roth's age and my age.

3. In the Spring 88, openings for regular appointments at the Program was advertised, to which I applied. Sergio Antoy ("Antoy"), who

was in his mid thirties, was hired on a regular appointment; I, on the other hand, was rehired to a second visiting appointment from August 16, 1988 to May 15, 1989, corresponding to the AY 88-89, at the rank of Associate Professor. In the Spring 89, offers of regular appointments at the Program were extended to other applicants. I was rehired for a third visiting appointment from August 16, 1989 to May 15, 1990, corresponding to the AY 89-90, at the rank of Associate Professor. The three visiting appointments constituted three years of service without tenure.

4. In the Spring 89, Antoy resigned his position with the Program, and regular position openings were advertised, to which I applied. Whereas offers of regular appointments were made to two other applicants, I was offered yet another visiting appointment which I declined, indicating I would only accept a tenured regular appointment. A dispute between Allison and Egyhazy led to removing Egyhazy from his Program Director position, and the future of the Program was in serious trouble. Allison then decided to offer me a regular probationary appointment, which I accepted. I was expecting Allison to offer the position of Program Director vacated by Egyhazy. He did not.

5. The first regular probationary appointment, offered by letter from Allison to me dated May 31, 1990, was for three additional years of service without tenure, starting August 16, 1990 and ending May 15, 1993, corresponding to AY 90-91, 91-92, and 92-93, at the rank of Associate professor, with a starting salary of . The letter indicated that my review for a tenured appointment would take place during AY 92-93, which is the third year of my probationary service and the sixth year of service without tenure. The letter also indicated that AY 93-94 (the seventh year of my full-time employment) would be the last year of my service without tenure, (if my contract was renewed beyond AY 92-93); which is in compliance with the FH provision requiring tenured appointments beyond the first seven years of service. Accordingly, and in compliance with the provisions of the Handbook, my service for AY 1994-95 and beyond must be with tenure, if such service was to be continued.

6. In September 1991, I wrote to Allison requesting that my tenure review be done in 93-94 rather than 92-93, which he approved verbally by phone. I understood this change in the my tenure review year to mean that one of the following scenarios could occur, according to the FH provisions:

(a) If an additional one-year regular appointment for 93-94 is not offered, or is offered but not accepted, then my employment would end in 92-93, and no tenure review would take place.

(b) If on the other hand, an additional one-year regular appointment for 93-94 is offered and accepted, then tenure review would take place during 93-94, as agreed by the Department. Because 93-94 is my fourth year of probationary service, a negative review would constitute a withholding of tenure, not a denial of tenure, and no offer for a terminal year would be made. (FH 2.8.5.2). And because 93-94 was my seventh and last year of service without tenure, the Department has two options: not offering an appointment for 94-95, in which case my employment would end in 93-94; or offering an appointment in 94-95 which must be tenured, in accordance with the provisions of the FH and my Letter of Appointment of 1990.

7. In Spring of 92, before stepping down as Department Head, Allison hired William Frakes ('Frakes") on a one-academic-year appointment as Program Director, in an interim capacity, starting August 16, 1992. Before hiring Frakes, Allison asked me to review the applicants qualifications. Frakes degrees were not in Computer Science, had negligible teaching experience, and no academic administrative experience; which made him unqualified for the job in my evaluation. Allison did not act on my recommendation, and in a telephone conversation told me that "**the Program needs dynamic leadership**". Since Frake's background had no academic leadership whatsoever, and Frakes's resume indicated he was relatively young and most likely the youngest applicant, I construed Allison's "dynamic leadership" as proxy for "young leadership". I estimated Frakes's age to be 39, by the commonly used formula of assigning an age of 22 to the year of the Bachelor degree: (Age = Current

Year - Bachelor Degree Year + 22); which I confirmed later to be his actual age. At the same time, James Arthur ("Arthur") was appointed to replace Allison as Interim Department Head in a temporary capacity until a permanent Department Head is hired. In the Spring of 1993, Arthur chaired a Search Committee for hiring a permanent Program Director, and asked me by phone to serve on the Committee as the only faculty member from the Program. During the phone call he, surprisingly, echoed the exact remark of Allison: "**the Program needs dynamic leadership**". Among the five applicants considered for the job, I rated Frakes as the least qualified according to evaluation criteria provided by Arthur (See *Attachment*). Furthermore, student evaluations of Frakes's teaching was 2.7/ 4.0, a very low professor performance ratings by the students. Frakes was the youngest applicant. During the meeting, Arthur prevailed over the Search committee members, and chose Frakes for the job.

8. During the last 3 years of my employment with the Computer Science Program in Northern Virginia, Fall 92 - Summer 95, Frakes, as Program Director, was my immediate supervisor. During that period he talked openly about his age bias and preference for employing young faculty. In Fall 92 he told me, during a discussion about the importance for the Program of externally funded research, that what the Program needed was " **a couple of young PhD's to work on research contracts.**" In Spring 94, Frakes chaired a search committee, composed of Egyhazy and I, for filling an open one-year visiting appointment in the Program. Thomas Reid (age 54) was, in my assessment, the most qualified for the appointment. Frakes rejected Reid saying **"he's not going to make it [tenure]...he's too old"**; despite the fact that the opening was only for a one-year visiting appointment. Egyhazy agreed with Frakes, and the appointment was offered to, and accepted by, Sanjay Gupta ("Gupta"), age 29. In Spring 95, during lunch with Frakes and Gupta, Frakes said to me "I finally got rid of Dick Schneider," referring to Professor Richard Schneider (age 62), who has been on the Program faculty since 1979. When I expressed surprise, and asked Frakes if he was aware that Schneider had

been the **oldest-serving** faculty on the Program; he retorted sarcastically, while smirking, **"I guess he must be the oldest,"** in an obvious pun on Schneider's age. The courses that Schneider had been teaching, were assigned by Frakes to Gupta. On August 11, 1997, I took Frakes's deposition, during which he identified a letter dated February 2, 1995 from himself to Dean Robert Bates; in which Frakes declares: **"If I can fill our two open positions here with young faculty, our research income can increase dramatically."** Both Gupta and I applied to these positions, advertised for Fall 95. Frakes rejected me, and hired Gupta (age 30) on a regular appointment. Frakes admitted in his deposition that he was the sole decision maker in rejecting my application.

9. In February 1993, Arthur came from Blacksburg to the Northern Virginia Center. After meeting with Frakes, he met with me to discuss my 1992 annual evaluation, written on a single sheet entitled Department Head Comments, signed by himself. I was surprised by the unexpected underrating of my performance, compared to all previous evaluations over 5 years; and by the factual errors, misleading assessments, and apparent lack of understanding of my true record and the Program conditions in Northern Virginia reflected in his evaluation of my performance. Arthur suggested that I should start looking for a position elsewhere. In response, I defended my performance record, pointed to the impropriety of the evaluation, and expressed my belief that the sudden underrating of my performance can only be explained by the intent of the Program and the Department to replace me with young faculty, notably after the appointment of Frakes as Program Director. I told Arthur that "I will not take this lying down," and will oppose actions that are not based on merit and proper motives.

10. In the Spring 93, Arthur offered me an additional one-year regular appointment for 93-94, in a letter dated (*Attachment*). The letter correctly referred to the previously agreed year of my tenure review namely, 93-94; but erroneously referred to 94-95 as the last year I may serve without tenure. I responded by letter dated (*Attachment*), asserting

that the FH provisions (and the 1990 Letter of Appointment) dictate that 93-94 was to be the last year of my non-tenured appointment, and accordingly, an offer and acceptance of employment beyond 93-94 must be for a tenured appointment

11. My employment was continued for a second regular probationary appointment for the academic year 93-94; from August 16, 1993 to May 15, 1994; corresponding to my 4th probationary year and my 7th and last year of non-tenured service. In Fall 93, the Department Personnel Committee, chaired by Allison, reviewed my candidacy for tenure, based on the opinions and recommendations from Frakes and Egyhazy, as well as from outside reviewers; and decided not to recommend tenure. Arthur, Interim Department Head, concurred. This 4th probationary year negative tenure review constitutes a withholding of tenure, not a final denial of tenure, and does not entail an offer of one-year terminal appointment (FH 2.8.5.2). Arthur informed me of the negative recommendation by letter dated December 13, 1993, which offered a terminal one-year appointment for 94-95, in clear violation of the FH provisions (*Attachment*); to which I responded by letter (*Attachment*), re-asserting that the negative recommendation constitutes tenure withholding, and that employment in 94-95 and beyond must be on tenured appointment. Furthermore, Arthur's letter of December 13, 1993 did not constitute a termination notice, even if the alleged denial of tenure was true {See FH 2.11 and Section I.4 *supra*}. Since my appointment at the time he wrote the letter was to end on May 15, 1994; the letter constitutes an **offer** for an extra year, which I could accept or decline. Acceptance of the offer would be for a tenured appointment, as the FH dictates service must be beyond the 7th probationary year.

I met with Frakes and Arthur on several occasions, re-asserting to them my belief of the underlying discriminatory intent of these actions. I also wrote to Dean Robert Bates ("Bates") expressing my belief in improper motive and stating my intention to appeal the negative recommendation at the College level and to the Faculty Senate Committee

on Reconciliation. The appeal at the college level denied me reversal of the negative recommendation.

12. In January 94, John Carroll ("Carroll') was hired into the position of Department Head in Blacksburg. From the outset, Carroll showed little interest in the affairs of the Program in Northern Virginia, leaving all decision making to Frakes, who established a direct line of authority with Bates, bypassing Carroll. I never met Carroll or interacted with him in the workplace. My employment continued into 94-95, corresponding to my 8th year of service, which, according to the FH provisions must be service with tenure. Furthermore, In his long-term course scheduling for the Program, Frakes assigned me full-time teaching load for the Summer Term of 95 and the Fall Semester of 95-96 (*Attachment*). All this led me to believe at the time that Frakes, Carroll and Bates were willing to abide by the policies and procedures of the University as embodied in the FH. This also led me to believe that my express and firm opposition to the age animus and discriminatory treatment towards me was being effective in curtailing Frakes and his superiors from going any further in such disparate treatment.

13. In Spring of 95 I perceived a resumption and escalation of the level of harassment which has been directed against me by Frakes and his superiors, manifested by denial of salary raises, denial of my entitlements to travel funds, and denial of adequate computer equipment and staff support. This was followed by the serious adverse action of demoting me from the regular faculty status to the adjunct faculty status, with drastic loss of compensation, total loss of employment benefits, and annulment of entitlement to early retirement benefits. Since the demotion to the adjunct status was in clear violation of the FH provisions, I appealed the action to the University Senior Vice President and Provost. I also appealed to the Faculty Senate Committee on Reconciliation. Since my demotion from the regular faculty status to the adjunct status creates an opening for a regular faculty position in the Program, I perceived the demotion as motivated by Frakes's declared desire to bring young faculty into the Program. I

protested this discriminatory animus by letters to Frakes, Carroll, and Arthur. I also perceived that the escalated harassment and the demotion were designed to force me to resign. In May 95, Frakes demanded that I vacate my office, despite my full-time teaching assignment for the Summer and Fall of 95. I appealed the action by filing a formal grievance according to the procedure in FH, and also appealed to the Faculty Senate Committee on Reconciliation. Under the strain of work and these disputes, I was experiencing an intense aggravation of a painful colon health problem. I thought of taking a sick leave to seek medical treatment. By memorandum dated June 1, 1995, I requested Frakes to find a substitute instructor to relieve me of the remaining three weeks of my summer teaching assignment. Two days later, I felt better, and suspended the request for a substitute instructor; and made several attempts to reason with Frakes about my keeping some office space for the remaining three weeks of the Summer teaching. Finally, I gave up on trying to keep the office, and informed the Center Director that I would vacate the office by June 12, 1995. On June 8, and before I could finish vacating my office, Frakes arranged for two police officers to evict me from my office, who handed me a letter from Frakes terminating my employment with the University, and a second letter from the University Chief of Police banning me from trespass on all University premises. I continued to receive my regular salary payments and full employment benefits until August 15, 1995. The eviction and banning entailed a de facto cancellation of my 95-96 full-time teaching assignment.

I swear, under the penalty of perjury, that all statements of fact in the foregoing narrative are true to the best of my knowledge and belief.

"s/ Emile Haddad"
Emile Haddad

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FILED
SEP - 5 1997
CLERK, U.S. DISTRICTCOURT
ALEXANDRIA, VIRGINIA

EMILE HADDAD,
Plaintiff (Pro se),
v.
VIRGINIA POLYTECHNIC INSTITUTE
& STATE UNIVERSITY,
Defendant.

ORDER

For the reasons stated in open court, defendant's Motion for Summary Judgment is DENIED in part and GRANTED in part, and it is hereby

ORDERED that judgment be and is entered against plaintiff and in favor of defendant on Count I with respect to claims I.A through I.F of the Complaint and on Count II with respect to claims II.A through II.G, II.I, and II.K.

Defendant's Motion for Summary Judgment is DENIED on Count I with respect to claim I.G (Discriminatory Refusal to Rehire) and on Count II with respect to claim II.H (Retaliatory Denial of Wages), claim II.J (Retaliatory Refusal to Rehire), claim II.L (Retaliatory Conversion of Personal Property), and claim II.M (Retaliatory Denial of Favorable Reference and Injury to Future Earning Ability).

The Clerk is directed to forward copies of this Order to counsel of record and plaintiff, pro se.

Entered this 5th day of September, 1997.

"s/ Leonie M. Brinkima"
Leonie M. Brinkima
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

EMILE HADDAD,
Plaintiff,
v.
VIRGINIA POLYTECHNIC
INSTITUTE AND STATE UNIVERSITY,
Defendant.

Civil Action No. 97-388-A

Alexandria, Virginia
September 5, 1997
11:30 a.m.

EMILE HADDAD,
Plaintiff,
v.
VIRGINIA POLYTECHNIC
INSTITUTE AND STATE UNIVERSITY,
Defendant.

Civil Action No. 97-1189-A

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: EMILE HADDAD, Ph.D., pro se
11563 Holly Briar Lane, Great Falls, VA 22066

FOR THE DEFENDANT: KAY HEIDBREDER, ESQ.
Virginia Polytechnic Institute and State University, 219 Burruss Hall
Blacksburg, VA 24061-0121

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES
OFFICIAL COURT REPORTER: ANNELIESE J. THOMSON, RMR, CRR
U. S. District Court, Sixth Floor
401 Courthouse Square, Alexandria, VA 22314

PROCEEDINGS

THE CLERK: Civil Action 97-388, Emile Haddad versus Virginia Polytechnic Institute & State University, and Civil Action 97-1189, Emile Haddad versus Virginia Polytechnic Institute & State University. Counsel, please note your appearance for the record.

MS. HEIDBREDER: Good morning, Your Honor. My name is Kay Heidbreder, and I represent the defendant, Virginia Tech.

THE COURT: All right, Ms. Heidbreder. Thank you.

DR. HADDAD: Good morning, Your Honor. My name is Emile Haddad. I'm plaintiff, pro se.

THE COURT: Thank you, Mr. Haddad. Good morning. All right. What I have before me today is the plaintiff's motions for sanctions, summary remand and costs, and also a defendant's motion to dismiss as to Civil Action 97-1189. I want to address that case first. And then we also have a defendant's motion for summary judgment in Civil Action 97-388-A.

Now I want to make absolutely clear, although I think it's clear from the papers , but is it correct that the complaint in 97-1189, that is, the case that was removed to federal court, is exactly the same complaint as the Federal Action 97-388?

DR. HADDAD: The original complaint --

THE COURT: You need to speak from the podium, sir.

DR. HADDAD. I'm sorry. The original complaints were

identical, except, of course, for the jurisdictional aspect and so forth --

THE COURT: Right. All right.

DR. HADDAD: -- as far as the claims are concerned. As it stands now, though, the case filed in this court has lost some of the claims --

THE COURT: Correct.

DR. HADDAD: -- while the one in Fairfax state court still is intact, because it was served -- it was filed, service was delayed, and then immediately after service, the defendant removed it to this court.

THE COURT: All right. Well, Mr. Haddad, the defendant had an absolute right because of the way you pled that case, you pled a federal cause of action by referring to the ADEA. That's a federal cause of action, which is properly, can be properly removed to this court. So there's no basis for a remand of that complaint as it's written, nor is there any basis for sanctions or costs. That was a correct, appropriate maneuver by the defendants, and this Court has no choice but to dismiss that cause of action in this court.

Now I understand your complaint is that you feel you may have state causes of action which the state court would look at differently than the federal court. You may still -- and I don't know if you can or not -- it's still possible you may be able to file state causes of action in state court, but if you

understand what I've done, all right?

DR. HADDAD: Okay.

THE COURT: All right. Now the remaining two counts are now before me on the defendant's motion for summary judgment, and I want to go over a few facts in this record, because it is a voluminous record, and also, quite frankly, the defense was at a disadvantage in that they apparently did not get your opposition until quite late this week. As a result, this Court has no reply brief. Usually in a case that is this fact bound, we get that. So there are some questions that I have to ask Ms. Heidbreder, because I haven't seen her response to your opposition.

Ms. Heidbreder, let me ask you this: I am quite concerned about a letter that Mr. Haddad refers to in which -- I'm going to forget his name, the supervisor. It's the letter in which there's reference made about replacing the two vacancies with younger faculty, what I'm going to call the smoking gun letter. What I need from you is a discussion about that letter, Mr. Frakes or "Frakes," I don't know how you pronounce his name, that's the letter of February 2, 1995.

MS. HEIDBREDER: Yes, Your Honor. I believe it's pronounced "Frakes," his name is pronounced "Frakes.11

THE COURT: "Frakes," all right.

MS. HEIDBREDER: He was the program area leader, and I need to explain, if I could just briefly, the way the organization was set up. There's a program in Northern Virginia

that is a, that is a smaller part of a department which is located in Blacksburg, Virginia. It's the Department of Computer Science, and, of course, it's part of the larger university. The Department of Computer Science is housed within the College of Arts and Sciences, which is another division of Virginia Tech.

THE COURT: Right.

MS. HEIDBREDER: The record is clear, we believe, based on the affidavits provided by Dr. Allison and also Dr. Arthur, who had been former department head, and even Dr. Carroll, who is the current department head, that the decisions relative to salary were not made by Dr. Frakes. Those decisions were made by the department head down in Blacksburg.

In addition, Your Honor, the tenure decision, the denial of decision was made by a personnel committee first at the department level, not in the program, that -- the program up in Northern Virginia, and there is nothing in the record and I am, have not been informed, I do not believe that Dr. Frakes was on that personnel committee. In fact, Dr. Frakes had not even been awarded tenure himself at the time that Dr. Haddad was considered for tenure. And so Dr. Frakes had no input on that committee into making the negative tenure decision.

That negative decision was done by a personnel committee, as I said, in Blacksburg. It was considered also by the department head, who at that time was Sean Arthur -- James Arthur. He goes by Sean. And it was also appealed.

Dr. Haddad appealed that negative tenure decision by the department to the college. Again, Dr. Frakes was not a member of the college committee, and that -- there was a negative decision by the college.

I'd also object to that letter, because there's no proper foundation for addressing that letter in this proceeding. It was not appended to an affidavit. It's not properly before the Court. The proper rules have not been followed for, quite honestly, most of the submissions that Dr. Haddad has made in this case.

THE COURT: Well, was Frakes deposed during the discovery in this case?

MS. HEIDBREDER: He was deposed during the discovery in this case. That letter was addressed during discovery, and that portion of the deposition has not been appended to Dr. Haddad's reply.

That portion of the deposition shows that that letter -- first off, there were no questions asked about the, the question of hiring younger faculty into the position, but the, the deposition testimony reveals that what Dr. Frakes was concerned about was a budgetary issue, and younger faculty often in an institution of higher education --

THE COURT: Are cheaper. They're less expensive.

MS. HEIDBREDER: That's right. And it's not a euphemism for age, but it's a euphemism for individuals who have

not had a degree as long.

THE COURT: All right.

MS. HEIDBREDER: In addition, there is testimony that we appended from that same deposition of Dr. Frakes which shows his clear testimony in his deposition that he made no decisions about Dr. Haddad with regard to his age.

THE COURT: All right. Now in the -- another thing that is sort of missing or that I don't see in this record is in the various appeals of the tenure decision that Dr. Haddad filed, was there any explicit reference or claim that tenure had been denied because of his age?

MS. HEIDBREDER: No, there isn't. In fact, quite the contrary. All of the statements that Dr. Bates made, who was the dean of the College of Arts and Sciences, and the relevant portions of his deposition transcript are appended. Dean Bates said very clearly that age was never a consideration in terms of Dr. Haddad's candidacy for tenure.

THE COURT: All right. And does Blacksburg -- I mean, I don't recall whether this is in the record, and again, I haven't seen any final reply from you, so I don't know whether it would have been -- but is there within this record -- and I don't think there is, but I want to make sure I didn't miss it -- any statistical approach or description of, for instance, what the age is of your tenured faculty or anything like that? I don't have that before me.

MS. HEIDBREDER: No, there isn't. We did not believe it was, quite honestly, relevant, because there were no age considerations in this case, and truly, we just believe that Dr . Haddad has not presented a prima facie case of any kind, and so no.

THE COURT: All right. One other question: Dr. Haddad -- because your first argument in your motion for summary 3udg-ment is that Dr. Haddad is procedurally barred from most if not all of his claims because an age discrimination complaint was not filed with the EEOC within the statutory 180 days. His response to that, as you know, is that you do not adequately post notice to employees about the age discrimination filing, etc.

My understanding is that there is an age discrimination notice-type thing in the Personnel Office. Where is that Personnel Office located?

MS. HEIDBREDER: The Personnel Office is located on the campus. Dr. Haddad, however, has been to the campus numerous times.

THE COURT: In Blacksburg?

MS. HEIDBREDER: That's correct. It is in Blacksburg, and he has been to the campus in Blacksburg.

THE COURT: Where in the record that is before me right now can you point that shows that he's been in that office while that document was posted?

MS. HEIDBREDER: I don't know if he's been in the Personnel Office. I acknowledge that. But the case that he cited, I believe it was the rse case that he cited, states that a personnel office is an appropriate location where you can post an EO/AA notice.

THE COURT: All right. What about in your handbooks, your employee handbooks? I know there's a lot of reference to the faculty handbook. Is there anything in that that discusses the EEO laws in the United States?

MS. HEIDBREDER: If there is, I honestly don't know the answer to that. The faculty handbook is appended.

THE COURT: Right.

MS. HEIDBREDER: I believe there is, but if I could take just a moment to look?

THE COURT: I don't think we saw it.

MS. HEIDBREDER: There may or may not be.

THE COURT: We never found it, but I mean --

MS. HEIDBREDER: Okay.

THE COURT: All right. Assuming for the sake of argument, giving Dr. Haddad the benefit of the doubt since he is pro se, let's assume for the sake of argument that he did timely file with the EEOC, all right? The claim with the EEOC or actually the claim that's before this Court is purely age discrimination.

MS. HEIDEREDER: And retaliation.

DR. HADDAD: And retaliation.

THE COURT: And retaliation, all right. I guess now I want to hear from Dr. Haddad.

Dr. Haddad, one of the concerns I have in this case is the chronology of events, because an individual is only -- you can't even make out a prima facie case for retaliation unless you can show that, No. 1, you engaged in protected activity.

Now the filing of your EEOC complaint with -- I mean, your age discrimination complaint with the EEOC is clearly protected activity.

DR. HADDAD: Right.

THE COURT: But that protected activity occurred in August of 1995.

DR. HADDAD: It started in July and continued in August, yes.

THE COURT: All right. Do you agree that before those dates, you had not engaged in any protected activity?

DR. HADDAD: I submit to the Court that I have, Your Honor.

THE COURT: All right. Tell me, show me where in this record you specifically believe that you had made an appropriate complaint about age discrimination.

DR. HADDAD: Well, I did state, of course, in my memorandum that the opposition to discrimination that preceded the EEOC complaint was numerous --

THE COURT: It has to be more than that. You have to show me where specifically did you tell anybody at the university, "I have been the victim of age discrimination."

DR. HADDAD: Okav. It's in section 11.

THE COURT: If you mean your memo of June 2, 1995, I think on the third or fourth page of that, you say, "I have expressed to you on several occasions my conviction that the true underlying motive for the wrongs being committed in my case is the desire of the department and the university to replace me with young faculty, irrespective of qualifications. I hope you do not subscribe to this position.',

DR. HADDAD: Well, there are several such communications on all levels. When I did not receive any response from lower levels, I addressed the same issue to higher levels, complaining about discrimination, and I did put that also in my appeal for the tenure decision.

THE COURT: You specifically said that younger faculty were getting preference over older faculty?

DR. HADDAD: I did.

THE COURT: I need to see that, because that may change my concept of where the time line falls in this case.

DR. HADDAD: Now --

THE COURT: Is it in this record?

DR. HADDAD: It is in this record, referred to in the very last item of appeal.

THE COURT: Which tab is that, please?

DR. HADDAD: Okay. It is in tab 21.

THE COURT: 21?

DR. HADDAD: This has been entered into -- in the deposition. 21. Okay.

Now let me explain, Your Honor --

THE COURT: No, I'm sorry, Dr. Haddad, I just want you to show me which page. Where in this --

DR. HADDAD: The very last, the very last page in that group, under 21, the very last argument, No. 38.

THE COURT: Hold on a second.

DR. HADDAD: Very last page. Well, I'm sorry, not the very last, but the one before the last.

THE COURT: Well, all it says here is Indications of Underlying Influences Unrelated to Merit.

DR. HADDAD: Right. Now when this appeal went, I was allowed to present oral arguments, and I left the question of that in the oral arguments. They asked me what are the -- they referred me to the indications of underlying influences unrelated to merit, because I have already indicated to Arthur and the others about my concerns in writing about the age discrimination animus in the decision to withhold tenure.

THE COURT: All right. Where is that in the record? I'm looking for where is there evidence that you had gone on record complaining about age discrimination before the events of

the summer of '95?

DR. HADDAD: Okay. Well, the several memoranda that are in the record here, one --

THE COURT: I'm sorry, maybe I --

DR. HADDAD: You only saw one.

THE COURT: The only one I've seen is the 195, I believe it's a 195 date.

DR. HADDAD: Okay. There are --

THE COURT: Ms. Heidbreder, is there a transcript of any kind of the proceedings, the oral proceedings before the committee?

MS. HEIDBREDER: No, there's not, Your Honor.

THE COURT: So there's no evidence or no record of that other than the plaintiff's statement?

MS. HEIDBREDER: No, there is not, Your Honor. No.

THE COURT: Are there minutes kept or any kind of report?

MS. HEIDBREDER: No, Your Honor. It's not in the record, but the dean did testify during his deposition that there is no transcript kept of the meeting and there are no minutes kept of the meetings. The only official record of the meeting is the actual letter that the dean sends out to the candidate, and in this case, that letter is appended to Dean Bates, deposition.

THE COURT: All right. Dr. Haddad?

DR. HADDAD: There's a letter to the senior vice

president and provost.

THE COURT: All right. What date, please?

DR. HADDAD: October 5, 1995.

THE COURT: But that's after you filed with theEEOC.

DR. HADDAD: okay. Right.

THE COURT: All right, here's the difficulty. You can't bring a retaliation claim or it won't fly for any activities that occur before you actually protest about age discrimination. The only evidence that I see in this record of any possible claim about age discrimination occurs in the summer of 195, and therefore, certainly as to any events before 195 in terms -- or any decisions made, particularly the tenure decision, there is no way in which one can argue that the denial of tenure was somehow in retaliation.

DR. HADDAD: Can I point to the record? Again, Your Honor, in my sworn, sworn statement of testimony, in section 1, I refer to all the oppositions that I have engaged in, starting from February of 1993, and I can refer you to the specific section of, of that sworn testimony, No. 9, section 9.

THE COURT: Well, that's not good enough. There has to be some clear evidence that you had engaged in protected activity. The mere fact that you believe you were the victim of discrimination or may have even, frankly, informally said to someone, you know, I think that I'm not getting a particular salary or I didn't get my summer job or I didn't have this or

that because of my age, that's not protected activity. There has to be a complaint.

If you'd written a letter to the dean saying, "I believe I'm the victim of discrimination," if you'd gone to the Human Resources Department within VPI or gone to the EEOC, which you did finally do, at that point, the law deems you to have engaged in protected activity, and then you may have at least that prong of the prima facie case established.

DR. HADDAD: I have filed grievances with the, with the Committee on -- the Faculty Center Committee on Reconciliation, stating that the underlying reasons are discrimination.

THE COURT: The word itself doesn't do it. You have to say what discrimination. What is it that you're claiming they've done? Because we use the word "to discriminate,, in the English language, that's not good enough. You have to have said I have been mistreated because of my age, my ethnic background, or whatever. You need to show me where you've said that.

DR. HADDAD: Okay.

THE COURT: Well, Dr. Haddad, I'm sorry, you've had a chance to submit pleadings. They're extensive. We did look through, I think, every single page of this very large package, and I didn't see it. That's why I was asking you today if I've missed something.

DR. HADDAD: Okay. We saw -- you only spotted the one that you referred to.

THE COURT: Right. But in terms of the retaliation claim, I'm going to grant summary judgment to the defendant in this respect: You make specific allegations about retaliation, specifically, retaliation in denial of equitable compensation, summer employment, denial of promotion, and retaliatory harassment.

None of the activities involved or alleged in those four claims that occurred before the June of 1995 letter, which I'm giving the plaintiff the benefit of the doubt on that, are, are actionable in this court, because there had not been any engagement in protected activity, and therefore, the only areas where I believe there may arguably be a case would be the claim that somehow the plaintiff was retaliated against in that letters of recommendation were not submitted by the university after this summer of 1995 time period, and the only other area is that he claims, as I understand it, that he has certain personal property to which he would be allowed access that he could not get after that time period.

But in all the other areas, they're just not appropriate to bring under a claim of retaliation, since I cannot find in this record that the plaintiff engaged in any protected activity where there was a clear and specific reference to a belief that age discrimination was occurring before his letter in I think it was June 1st or 2nd, whatever it is, of 195, and as I said, I'm giving him a two- or three-month benefit of the doubt

on that. So I'm ruling in that respect.

I think that just about, frankly, except for really the letters of recommendation and the property, that's all that's left of count 2.

In terms of count 1, in terms of discrimination, the –

DR. HADDAD: May I respond to the remarks that Ms. Heidbreder made?

THE COURT: I've ruled on count 2. I'm going to address count 1 now.

DR. HADDAD: No, no, she made statements in relationship to count 1 as well --

THE COURT: All right.

DR. HADDAD: -- about Mr. Frakes, and she's wrong.

THE COURT: All right.

DR. HADDAD: She said that he had no input whatsoever in the tenure decision, and that is not true. He wrote a letter which was considered by the committee because he was my immediate supervisor, and that letter was very substantial in influencing the decision on withholding tenure at that time because of him being my immediate position (sic).

And then that statement, "If I can fill those two positions with young faculty, our research income will increase," has nothing to do with budget. In fact, the budget has been cut, and he has been complaining about it.

The reference in that statement is if he personally --

"If I can fill those two positions with young faculty, our research income will dramatically increase." There is no relationship to money or budget involved there.

And he said if I, meaning he was going to do it, and in his deposition, he admitted that he was the only person on the search committee that deleted my name from the pool of applications to that position, and I have the transcript with me on that.

So that connects him directly. His age discrimination animus expressed in that sentence connects him directly to my demotion, which happened around the same time, my termination in the summer, and his, his refusal to rehire me, on which he was the sole decision maker.

THE COURT: And the decision to rehire, you're talking about the fall of the 195-'96 year?

DR. HADDAD: Right. However, they have already assigned me a full-time teaching appointment. They're claiming that they assigned me a full-time teaching assignment in '95-'96 on a demoted level, and that's one of the issues in the, in the case, demoting me and giving me only one-fourth of the salary, with no benefits whatsoever, after eight years of service, is one of the major issues in this complaint.

THE COURT: But you were adjunct at that point, were you not?

DR. HADDAD: Well, they demoted me -- I say that this

adjunct demotion is, is in violation of the faculty handbook provisions.

THE COURT: But do the -- does the universe -- is it your view that the university has any choice? When tenure is denied to a faculty member, when tenure is denied, which was done in 193, is there any position in which a faculty member can be kept on full-time staff, not adjunct status, once that tenure period has elapsed?

DR. HADDAD: It is a major issue of material fact.

THE COURT: Just answer the question for me first.

DR. HADDAD: Yeah. If tenure is denied --

THE COURT: If it's denied.

DR. HADDAD: -- they can hire the person, according to the deposition of Pat Hyer, who was a designee of the defendant, she said they can be hired 99.9 percent full time and on a visiting appointment perhaps.

However, Your Honor, what is important is what you started with. I was not denied tenure in 1993. I was withheld tenure, because that recommendation took place in my fourth probationary period, and the faculty handbook clearly says only in the sixth probationary period does a negative tenure recommendation and decision is final and it's considered denial of tenure.

And that's why I went to great lengths in bringing that issue here, because if we do not see that, although it is a

contractual issue, but it is relevant to the discrimination issue and the question of timing and what was the notification at that time.

THE COURT: Well, the problem is I, I think the gravamen of your case is the denial of tenure, and the difficulty I have is that on this record, I do not see a scintilla of evidence that shows that age discrimination played any role in the denial of tenure, and it is not this Court's job to be second-guessing academic governance decisions made by universities unless the decision has been affected by an improper, illegal consideration, such as age.

But you -- again, the difficulty you have in this record is that the operative decision was made, as I see it on this record, in 1993. The letter that was, notified you that you'd been denied tenure was dated December 13, 1993. That has prospective effect, and you were given notice that the last year that you would be employed with the university would be the '94-'95 academic year.

Now you had appealed those -- that decision, as I understand it, and all the levels of that appeal through the university's internal appeals process were denied, and the last and final ruling on that process occurred sometime, I think, in '94. So that, in fact, that process was complete almost a year before Frakes' letter ever issued, isn't that correct, in terms of just the chronology?

DR. HADDAD: No, it's not.

THE COURT: All right.

DR. HADDAD: Because that decision is not a denial of tenure. That is simply a withholding.

Tenure can take place -- tenure review can take place at any year during the probationary period, and the faculty handbook clearly articulates that if a tenure review takes place at any time before the sixth probationary period, then nothing happens, because what the faculty says is the certainty with which this tenure revision or decision will be made later in a limited time.

THE COURT: All right. Let me hear from the defense on this.

MS. HEIDBREDER: Your Honor, the position of Virginia Tech -- and I think it's borne out by the record and the letters that you cited clearly show that Dr. Haddad was denied tenure. His employment originally began on a series of one-year visiting appointments. Eventually he was placed on the tenure track.

His letter of appointment stated that those visiting appointments would be considered as part of his probationary period, and so he, in fact, got his probationary period. He had to go up for tenure the year he went up, and he was denied tenure.

Yes, it was back in December of '93 originally by the department. The appeals were concluded, and then in January of

'94, he got the final letter from the dean saying there were no further appeals.

Now Dr. Haddad will argue that, well, since he got one extra year, he automatically got tenure, but there is a letter in the file -- in the record, and it's appended to Dr. Haddad's deposition, in which he specifically requested that his first visiting appointment, that first one-year visiting appointment not be considered as part of his probationary period.

That request was granted through the appropriate levels at the university. The record shows that that's before you. And so he got even an extra year, which doesn't mean he automatically gets tenure. It just means he got an extra probationary year that most faculty members do not get.

THE COURT: All right. Well, in any case, I'm satisfied that there's no evidence in this record of age discrimination affecting or contaminating in any respect the tenure process in this case, and so I'm granting summary judgment in favor of the defendant on that count.

Now the other problem I have with this case is that the other grounds of discrimination that are alleged in count 1 -- and there are quite a few specific instances of discrimination in terms of salary decision -- in terms of the summer employment, again, I think this record is quite clear that there is no evidence of age discrimination.

The summer employment situation, clearly the doctor

filed a letter on June 1. I understand that to have been within the time period that the summer school had started, right? Summer school was in session at that point on June 1 of 195?

]DR. HADDAD: Yeah.

THE COURT: All right. And in that letter, it unequivocally and clearly said he wanted a substitute or somebody brought in, because he felt that the working conditions had become too harassing and too difficult to work under.

Again, there's nothing in that letter that says I'm being discriminated against because of my age and this is an intolerable situation and therefore I can no longer work here. There's none of that kind of language.

And of course, then what happens is the university responds to that letter, goes out, gets a replacement. Now within a day or two of that first letter, there is a second letter in which apparently Dr. Haddad changes his mind.

But I don't find that that record shows that the university did anything inappropriate or discriminatory on the basis of age in promptly moving to find a replacement for the summer program, and the only issue that in my mind is left open is the issue about the fall employment.

There does appear to be evidence in this record that Dr. Haddad was scheduled to teach classes in the fall of 195, and I think the defendant has to address that issue, because he was apparently terminated from summer school employment, I think

reasonably so based on that letter, but you need to show me where in the record there's evidence that it was a, an appropriate decision and not age-discriminated -- not discriminatory on the basis of age to not continue the employment for the fall.

I mean, do you agree that he was scheduled to teach in the fall? I note there was something in your motion about --

MS. HEIDBREDER: No, we don't, Your Honor

THE COURT: All right. Now what's the evidence you have?

MS. HEIDBREDER: The problem may be Bill Frakes' deposition, and I honestly don't remember if we included it or not, said that he had talked to Dr. Haddad about teaching --

THE COURT: You included that. In the fall.

MS. HEIDEREDER: But it was never confirmed, and he never finalized it, and the process at the university is that in order to teach as an adjunct, and it would have been as an adjunct instructor, that there would have been a formal letter of appointment.

It has to be more than just a class schedule that's prepared months in advance, which is all Dr. Haddad has shown in the record. But there has to be a formal letter of appointment, and there was no formal offer letter of appointment for the fall of 1995.

THE COURT: All right. Now, Doctor, do you have in this record that's before me a copy of any letter or

communication offering you employment for the fall of '95?

DR. HADDAD: Your Honor, the letter would have come later if there was going to be such a letter. What has happened exactly is that all of this agreement about the full-time teaching assignment took place very early in the spring, and I went ahead with the preparations, and Mr. Frakes advertised the new course that I was going to teach, an advanced course, on the Internet, and students were coming to me saying, "We are going to join and do some thesis research," because this is an advanced program, and I went ahead with the preparations.

THE COURT: All right, let me stop you. Now the Internet advertisement, did it list you as the faculty member?

DR. HADDAD: Yes.

THE COURT: All right. Where is that in this record?

DR. HADDAD: Well, I didn't provide it, but I can. I mean, they cannot deny it. In his deposition, he said, "Yes, I advertised it on the Internet," and I received copies. It was everywhere in the world.

And besides, Your Honor, they have recorded this -- these in their own departments in Blacksburg, they have forms showing that I am assigned to teach for the fall. I will show you in which attachment I have those, official documents saying that Dr. Haddad is teaching two courses in the fall. And this is together with that announcement and the other thing. I should have included the e-mails, because they, you know, they went out

to everyone.

On section -- in section 13, of course, there's first this schedule posted on the board which the students see, and it was corrected May 5, as you see at the bottom, but then following those, there are two sheets that show signed April 15, that show me in the fall of 195 as teaching two courses.

THE COURT: All right.

MS. HEIDBREDER: May I make one additional comment?

DR. HADDAD: And in addition, Your Honor, following that, there is a long-term sheet planning by Bill Frakes himself that shows me in the spring of 196, my name is, first name is Emile, and then next to the course, 5516, and that's what we agreed upon, too.

And I went ahead with the preparation also under the understanding that my status is not going to be adjunct. That is a matter of contention, an issue of dispute, because I still claim that in 1994-'95, according to the faculty handbook and my agreement for the university, I must have been on a tenured appointment.

THE COURT: All right.

DR. HADDAD: And a contractual tenured appointment, contractually it is a tenured appointment based on the provisions of the faculty handbook.

Now if the contract issues are not in this complaint, but they are probative, because they show you pretext here, an

employer who violates his own provisions and policies is not going to be offering a legitimate nondiscriminatory reason for its actions anyway.

THE COURT: Well, all right. What I'm going to do on this, I think there's an issue on this issue of failure to rehire for the 195-'96 year, and that would fall within the period of possible retaliation or reprisal. So that will stay in count 2 as a retaliation claim.

In terms of age discrimination, though, or a discriminatory animus on the basis of age, I don't see it. I'm going to leave that claim in your case --

DR. HADDAD: Okay.

THE COURT: -- but it will come in the guise of retaliation for your having filed the discrimination suit.

DR. HADDAD: But if we connect that to Frakes' animus which was expressed in February, this comes after, and he was the man responsible for canceling.

THE COURT: All right, I'm going to leave that in count 1 as well. Count 1 will go forward on the refusal to rehire.

DR. HADDAD: Okay.

THE COURT: But that's all it's going to go forward on. The rest of this case, this is not a tenure case. The tenure issues will not be addressed in this lawsuit. The decision of the university whether to grant or deny tenure, because of the time frame in which it was done and because of the

record that's before me, I have not a scintilla of evidence that age played a factor in that.

DR. HADDAD: Okay.

THE COURT: Once the tenure was denied, that did put your employment status in a different context. I don't find there's any basis to allege or to go forward with a claim that you were demoted because of discrimination. If being adjunct is perceived as a demotion, that's as a result of the tenure not having been granted.

But it does appear from this record as if the university had planned to employ you in some position in the 195-'96 time period. You filed a formal complaint of age discrimination in August of '95, and that you, in fact, were not hired to work for 195-'96 after that.

You also, as I indicated earlier, the university apparently refused to give you letters of recommendation in that time period. You do have the smoking gun letter of Frakes in the spring of 195. I think there's enough to let those issues go to the jury.

DR. HADDAD: Your Honor, the question of refusal to rehire, which occurred in July of '95, is directly connected to the animus of Frakes as expressed in that letter.

THE COURT: I'm giving that to you.

DR. HADDAD: Okay.

THE COURT: The refusal to rehire is going to go to

trial. There's a material issue in this case as to that.]But in terms of the denial of tenure or what you perceive to be a demotion or any claim of unequal pay, all those other allegations I find on this record are just, there's just not enough evidence.

So because you're obviously very bright and very articulate, I'm surprised you never went to law school, so I have no doubt you can try this case well if it doesn't settle before then, but I want you to be clear, Doctor, that if you start to get off in these areas of tenure and extraneous matters, I will stop you during the trial if I'm the trial judge, all right?

DR. HADDAD: All right. Now to be clear on the issue of rehire, there are two things here: the refusal to rehire when I applied for the, for the regular position in '95, that's a different claim, and the cancellation of the 1995-'96 appointment. Both of those came after the, the evidence of the animus.

THE COURT: Well, is there a formal application you filed or a letter that you wanted to be rehired?

DR. HADDAD: Yes.

THE COURT: Which exhibit is that?

DR. HADDAD: It is in No. 3. I have my -- the very beginning of section 3, attachment 3. I have my application.

THE COURT: Is it, is it my understanding of the government's -- of the defendants position that because

Dr. Haddad was denied tenure, he could not be rehired in a regular faculty position? That's your position, isn't it?

MS. HEIDBREDER: That's correct, Your Honor.

DR. HADDAD: But that's not true. That's an issue of material fact.

THE COURT: All right, now wait Is it, in fact, the case that there have been professors denied tenure who are nevertheless hired as basically what I will call a non-adjunct full-time faculty member?

MS. HEIDEREDER: No. I've been at Virginia Tech 15 years, and that has never happened. They have been hired as adjuncts.

THE COURT: All right.

MS. HEIDBREDER: Faculty members have, and in fact, that is clear from the documents we have provided.

THE COURT: I mean, I've been an adjunct faculty member, not at VPI, and so I know adjuncts get paid a set fee for each course they teach, no benefits, no nothing.

MS. HEIDBREDER: That's correct, Your Honor.

THE COURT: All right. Now, Dr. Haddad, you feel that that's not correct. What facts in this record, all right, in the record can you show me where faculty members who have been denied tenure remained teaching at the university in a non-adjunct status?

DR. HADDAD: Well, first of all --

THE COURT: You have to answer my question first. Then I may give you a moment --

DR. HADDAD: There is nothing in the record to that, to the evidence.

THE COURT: All right.

DR. HADDAD: However, the faculty handbook, which is an articulated description of all the policies of the university in terms of hiring procedures, everything, which has been, for 100 years been revised and updated by lawyers meticulously every year, there is no provision in it at all saying that a faculty member cannot be rehired in the future sometimes. If somebody goes out and gets a Nobel Prize and the university doesn't want to rehire him, this doesn't make sense.

And in the deposition of Pat Hyer, and Ms. Heidbreder was there, I asked her, "Is there anything in the faculty handbook that says that?"

She says, "No."

And I asked her, "How then do you take this position?"

She says, "It's obvious.,,

Also, in the manual for hiring, which specifies all the conditions and procedures that the university gives to every search committee, there is nothing about that simple statement that says if the person has been so-and-so before, you cannot hire him.

THE COURT: All right.

DR. HADDAD: So they cannot support that, and therefore, it is an issue of material fact.

And when in Frakes', Your Honor, in Frakes, deposition, I asked him, "When you dealt with my, with my resume, did you deal with it like the other ones?"

And he said, "Yes."

THE COURT: Well, the problem you have, though, is that the record that is before me is that to the knowledge of everybody in this room and on this record, no faculty member has been hired in that situation, and again, the issue this Court has, it's a narrow view that this Court has to take; that's the way the law is, that is, whether or not discrimination, a discriminatory animus affected this decision.

What I'm hearing is that the university does not hire the tenure-denied faculty members back as full-time faculty members. They may hire them back as adjunct, and I'm letting you complain about your not being hired as adjunct, but although the manual may not prohibit such hiring, I'm told it's just never done.

DR. HADDAD: Well --

THE COURT: And I'm going to resolve this now. You'll have a lawsuit that goes forward in this court on claims of discrimination and retaliation in the narrow areas that I've ruled, and I'll put them in an order so there's no misunderstanding about that, but the great majority of your

claims I am granting summary judgment on.

If you have -- it sounds like your claim of a breach of contract action, that may or may not be recognizable in a state court action if you choose to file a state court action with that kind of a state court claim with it, but this Court is only going to be hearing a narrow area of claims under Title VII addressing the discrimination and retaliation.

DR. HADDAD: Your Honor, the issue of rehire to the regular position, as I explained in my brief, is a, a very compelling evidence of discrimination.

THE COURT: I just under this record, Doctor, I'm sorry, I don't see it.

DR. HADDAD: Your Honor --

THE COURT: No. If you had evidence that there had been --

DR. HADDAD: Your Honor --

THE COURT: Excuse me.

DR. HADDAD: -- they have to show that in that case, that they would have made the same decision anyway absent the discrimination of Frakes.

THE COURT: I think they already have. They have said they never do it, and you have no evidence to refute that.

DR. HADDAD: But --

THE COURT: Now we've had enough on this case. I'll get an order out which you will have in your possession on

Monday, and that will give you the parameters for the case that will go to trial for whatever date you have scheduled. Than you. We'll recess court until Monday.

(Which were all the proceedings had at this time.)

CERTIFICATE OF THE REPORTER

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

"s/Anneliese J. Thomson"

Anneliese J. Thomson

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

EMILE HADDAD,
Plaintiff (Pro se),

FILED
JAN 14, 1998
CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

v.

Civil Action No 97-388-A

VIRGINIA POLYTECHNIC INSTITUTE
& STATE UNIVERSITY.
Defendant

ORDER

For the reasons stated in an accompanying Memorandum Opinion, defendant's Renewed Motion for Judgment as a Matter of Law is GRANTED, and it is hereby

ORDERED that the jury verdict in favor of plaintiff on Count II.H in the amount of $2814.00 be and is set aside; and it is further

ORDERED that judgment be and is entered in favor of the defendant on Count II.H of the Complaint.

Plaintiff's Motion to Amend Judgment on the Retaliation Count Based on the Jury Finding of Retaliation, or for a New Trial in the Alternative and Motion to Amend Judgment on the Discrimination Count, or for a New Trial in the Alternative are DENIED.

As these rulings resolve all outstanding matters in this action, the Clerk is now directed to enter a final judgment in favor of the defendant on

all counts of the Complaint pursuant to Federal Rule of Civil Procedure 58. This action is now ripe for appeal.

The Clerk is directed to forward copies of this order to counsel of record and plaintiff, pro se

Entered this 14th day of January, 1998.

"s/ Leonie M. Brinkema"
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

EMILE HADDAD,
Plaintiff (Pro se),

v.

VIRGINIA POLYTECHNIC INSTITUTE
& STATE UNIVERSITY,
Defendant.

FILED
JAN 14, 1998
CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

Civil Action 97-388-A

MEMORANDUM OPINION

Before the Court are the parties' post-trial motions, each of which will be addressed in turn.

1. Plaintiff's Motion to Amend Judgment on the Retaliation Count Based on the Jury Finding of Retaliation, or for a New Trial in the Alternative

Plaintiff asks the Court, pursuant to Fed.R. Civ. P. 59(e), to amend the judgment to find in his favor on all of his claims of retaliation.[1] He argues that he proved the retaliatory intent of the defendant, specifically with respect to William Frakes and General Counsel Jerry Cain, because

[1] The Court addresses the arguments asserted in plaintiff's motion even though judgment has not yet been entered in this action.

the jury found in his favor on one of his claims of retaliation. Plaintiff further argues that because he established the retaliatory intent of Frakes and Cain, defendant had the burden to present evidence that it would have reached the same decision with respect to the adverse employment actions taken against him despite the presence of the wrongful motive. Plaintiff maintains that because the defendant failed to meet his burden, the Court should amend the judgment.

There are three recognized grounds for amending a judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice. See Hutchinson v. Staton, 994 F. 2d 1076, 1081 (4th Cir. 1993).

The first two grounds clearly do not apply, and the Court does not find plaintiff's argument persuasive on the third ground in light of the evidence presented at trial. With respect to plaintiff's claim of retaliatory conversion of property, defendant introduced evidence that it gave plaintiff every opportunity to collect his personal property after his termination. The defendant's explanation of the events surrounding plaintiff's personal property was both credible and reasonable, and fully supported the jury's decision on this issue.

With respect to plaintiff's claim of retaliatory denial of employment references, the Court again finds defendant's explanation of why plaintiff was denied favorable references both credible and reasonable. For example, both James Arthur and Jack Carroll testified that because plaintiff had been denied tenure and because of the unfortunate circumstances under which he left the University, they did not feel comfortable giving plaintiff a favorable reference. Other witnesses testified that they simply did not know plaintiff's work well enough to give him the kind of reference he wanted. Again this evidence was more than sufficient to support a reasonable jury's verdict

.Finally, with respect to plaintiff's claim of retaliatory refusal to rehire, the Court finds defendant's reason for not rehiring plaintiff in the

fall of 1995, namely that plaintiff had quit the summer class mid-semester, sufficiently credible and reasonable to support the jury's verdict. For these reasons, allowing the verdict to stand presents neither a clear error of law nor manifest injustice. Accordingly, the Court will deny plaintiff's Motion to Amend the Judgment.

Alternatively, plaintiff asks the Court for a new trial pursuant to Fed. R. Civ. P. 59(a). The standard governing a district court's consideration of a motion for a new trial was set forth in Wyatt v. Interstate & Ocean Transp. Co., 623 F.2d 888 (4th Cir. 1980). In that decision, the Fourth Circuit stated that a trial court may weigh the evidence and consider the credibility of the witnesses, and that it has a duty to set aside a verdict and grant a new trial, even if the verdict is supported by substantial evidence, if the court finds that it is against the clear weight of the evidence, based on false evidence, or will result in a miscarriage of justice. See id at 891.

In support of this request, plaintiff argues: (1) that the verdict was against the weight of the evidence; (2) that the jury finding of non-willful retaliation is against the weight of the evidence; (3) that inadmissible evidence regarding his tenure dispute with the defendant was introduced by the defendant; (4) that the jury instructions were defective; and (5) that he was prejudiced by the Court's truncating his case-in-chief.

The first argument, which was addressed above, does not persuade the Court. With respect to the second argument, we find that the jury's verdict of non-willfulness was not against the clear weight of the evidence, particularly in light of Frakes, credible testimony that he made the decision not to pay the plaintiff for the summer class because he had quit in the middle of the term. For this same reason, we do not find that denying plaintiff's motion on this basis would present a miscarriage of justice.

The third argument also is not convincing because we allowed evidence concerning the tenure dispute that conformed to its Order dated November 26, 1997, to be introduced by both parties, and only to the extent that plaintiff opened the door by introducing evidence of the merits

of the tenure decision did the Court allow defendant an opportunity to rebut.

Plaintiff's fourth argument also is not convincing because plaintiff did not object to the instructions at the time they were given as required by Fed. R. Civ. P. 51. Specifically, the Court asked the plaintiff:

> Q: Are there any further jury instructions the plaintiff wants be given?
>
> A: No, Your Honor.
>
> Q: Any objections to the instructions?
>
> A: No.
>
> Q: You need to make a record if you have any objections, Mr. Haddad.
>
> A: Okay. No objections.

The Court notes that even though plaintiff proceeded in this trial pro se, Dr. Haddad is very knowledgeable about court rules and procedure, as evidenced by his pleadings. Accordingly, plaintiff's motion cannot be granted on this basis[2] . Moreover, to the extent that plaintiff objects to the verdict form, the Court notes that plaintiff had at least three opportunities to object to that form before it was given to the jury and a substantial amount of time in which to review it, but did not note any objection.

Finally, with respect to plaintiff's fifth argument, the record clearly reflects that plaintiff was taking too much time. The Court gave him repeated warnings and finally a deadline, which was even extended. Accordingly, we find that plaintiff had more than fair notice of how much time he would have to present his case-in-chief and caused any prejudice to his case by refusing to use his time wisely. Because no miscarriage of justice resulted from this limitation, plaintiff's motion is DENIED.

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[2] Despite plaintiff's inability to bring this objection now, we note that the Court gave the jury both the definition of direct evidence and an instruction that retaliation and discrimination both could be proved by direct evidence.

2. Plaintiff's Motion to Amend Judgment on the Discrimination Count, or for a New Trial in the Alternative

This motion also is DENIED. The only new argument raised in this motion is that a finding of discriminatory intent was established by the "documentary direct evidence" contained in a letter from Frakes. to Dean Robert Bates, dated February 2, 1995, in which Frakes states: "If I can fill our two open positions here with young faculty, our research income can increase dramatically." The Court notes, however, that Frakes' explanation that by "young" he meant faculty who had recently received a doctorate degree was credible and a basis on which the jury could have found, and indeed did find, that Frakes did not act with discriminatory intent.

3. Defendant's Renewed Motion a Matter of Law

The Court can grant this motion, made pursuant to Fed. R. Civ. P. 50(b), only if the plaintiff failed "to adduce substantial evidence in support of his claim." Demaine v. Bank One, Akron N.A. , 904 F. 2d 219, 220 (4th Cir. 1990) . Defendant argues that plaintiff's retaliation claim should not have been allowed because plaintiff failed to exhaust his administrative remedies in a timely fashion. The jury found in favor of the plaintiff on that claim and awarded him $2814.00 in lost wages.

Defendant maintains that because plaintiff's summer teaching ended on June 5, 1995, any adverse employment action that plaintiff suffered occurred on that day. Defendant further maintains that because plaintiff did not amend his EEO charge to cite the defendant's failuz7e to pay his summer school wages until March 6, 1996, more than 180 days after June 5, 1995, plaintiff's claim is untimely. The Court finds, however, that the adverse action complained of by plaintiff in this claim is not that

his teaching ended, but rather that the defendant denied him wages for that teaching, and the record is not clear as to what date plaintiff should have realized that he was not going to be paid for the summer school class. Defendant presented no evidence at the trial to demonstrate that plaintiff knew on June 5, 1995, that he would not be paid. In fact, the evidence shows that plaintiff continued to receive paychecks from the University up until August 15, 1995, and that thereafter he made requests for payment for the summer class. This chronology would place discovery of this issue well within the 180day period. Accordingly, the Court will deny granting defendant judgment as a matter of law on this exhaustion ground.

Defendant also argues in its motion that plaintiff failed to present a claim of retaliation under the ADEA because he failed to offer any evidence from which a reasonable jury could find that the defendant's decision to deny plaintiff wages for the summer class was motivated by his threat to file an age discrimination claim. After reviewing the evidence presented at trial, we agree and find as a matter of law that plaintiff failed to adduce substantial evidence in support of his claim. Giving plaintiff every benefit of the doubt, we find that he presented sufficient evidence to make out a prima facie case. Specifically, he produced evidence that he had engaged in protected activity by communicating to Frakes, the decision maker, that he felt he was being discriminated against on the basis of age. Plaintiff also produced evidence that he taught a portion of the summer school class, prepared the mid-term examination, and offered to help prepare his replacement instructor. In addition, it is undisputed that plaintiff suffered an adverse employment action by not being paid for any part of the summer course. Although extremely thin, we find that this evidence is probably enough to support by inference a causal relationship between plaintiff's protected activity and the denial of wages.

Defendant, however, presented evidence of a legitimate, non-discriminatory reason for its action. Specifically, Frakes testified that Dean

Crofts advised him not to pay the plaintiff and to pay the replacement instructor the entire amount because plaintiff had not completed the course[3]. Because defendant came forward with a legitimate, non-discriminatory reason for denying the plaintiff wages, plaintiff could prevail only if he was able to come forward with evidence to show that defendant's proffered reason was a pretext for discrimination.

We find that plaintiff presented absolutely no evidence to rebut the defendant's legitimate, non-discriminatory reason for denying him wages for the summer class. For example, plaintiff did not present any evidence of the usual procedure for compensating, or not compensating, a summer school instructor who does not teach the entire course. He also presented no evidence that he was treated any differently than other adjunct professors who did not complete teaching their courses. Thus, outside of the mere inference raised in the prima facie case, there was no evidence presented at trial to support a finding that defendant's proffered explanation was a pretext for retaliation.

For these reasons, the Court finds that the evidence did not support the jury's finding that the decision not to pay plaintiff for his teaching only the first portion of the summer course was made in retaliation for plaintiff threatening to file an EEO complaint. Moreover, we note that the jury's finding on this claim is inconsistent with its findings of no retaliation on all of plaintiff's other claims. Accordingly, defendant's motion will be granted on this basis.

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[3] Defendant illustrated its reasoning by analogizing the situation to one in which a contractor is hired to repair a roof. After completing only a portion of his work, the contractor quits, leaving the homeowner with no choice but to hire a replacement. If the first contractor then requested payment for the roof repair after the homeowner already had paid the entire amount to his replacement, the homeowner would be justified in refusing to pay the first contractor because he had not performed the job that he was hired to do

4. Conclusion

For the reasons stated above, the plaintiff's post-trial motions will be denied, and the defendant's motion will be granted. An appropriate Order will issue.

The Clerk is directed to forward copies of this Memorandum opinion to counsel of record and plaintiff, pro se.

Entered this 14th day of January, 1998.

"s/ Leonie M. Brinkima"
Leonie M. Brinkima
United States District Judge

APPENDIX F

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EMILE HADDAD,

Plaintiff-Appellant,

v.

No. 98-1250

VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNRVERSITY,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, Chief District Judge;
Leonie M. Brinkema, District Judge.
(CA-97-388)

Submitted: July 21, 1998
Decided: August 6, 1998

Before MURNAGHAN and MICHAEL, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed as modified by unpublished per curiam opinion.

COUNSEL

Emile Haddad, Appellant Pro Se. Jerry Dean Cain, Kay Heidbreder, VIRGINIA POLYTECHNIC INSTITUTE & STATE UNIVERSITY, Blacksburg, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Emile Haddad appeals from the district court orders dismissing his due process and Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.A. §§ 621-634 (West 1985 & Supp. 1998), claims, and denying his motion to amend judgment or for a new trial, and granting Appellee's post-trial motion for judgment as a matter of law. For the reasons discussed below, we affirm..

Haddad first asserts that the district court erred in dismissing his claim that Virginia Polytechnic Institute & State University's ("Virginia Tech") actions with respect to denying him tenure violated his due process rights under the Fourteenth Amendment. We need not decide whether Haddad had a legitimate property interest in being granted tenure because the record shows that Haddad received adequate procedural due process protections prior to his denial of tenure and termination. With respect to Haddad's other alleged due process violations, Haddad's failure to acquire tenure status gave him no due process property interest in continued employment, and his allegations of conversion and that Virginia Tech's actions hindered his ability to find future employment are not cognizable due process claims.

Haddad also contends that the Eleventh Amendment barred the district court from exercising jurisdiction over his due process claims. The Eleventh Amendment limits the ability of a federal district court to exercise its subject-matter jurisdiction over an action for damages brought by an

individual citizen against a state or one of its entities. *See Lynn v. West*, 134 F.3d 582, 586-87 (4th Cir. 1998) *petition for cert. filed* (May 11, *1998); Roach v. West Virginia Reg'l Jail & Correctional Facility Auth.*, 74 F.3d 46, 48 (4th Cir. 1996). In so far as Haddad sought damages for the all6ged due process violations, we agree with Haddad that the Eleventh Amendment barred the district court from exercising jurisdiction over the claim. Because the district court lacked jurisdiction over the claim, we find that the court erred in dismissing the claim with prejudice. We therefore affirm as modified the district court order dismissing Haddad's due process claim reflecting dismissal of this claim without prejudice.

Haddad next assigns error to the district court's September 5, 1997, order granting Virginia Tech summary judgment on claims of retaliation and age discrimination.

Haddad first complained about age discrimination in the summer of 1995. Because Haddad did not engage in any prior form of protected activity, the district court properly found that he failed to establish a prima facie case of retaliatory discrimination based on events that occurred prior to the summer of 1995. Haddad also failed to establish a prima facie case of age discrimination in the denial of tenure. The only evidence Haddad presented that his age may have affected his employment status was a letter written in February 1995. The decision to deny Haddad tenure became final in January 1994. Therefore, the district court properly dismissed Haddad's claim that he was denied tenure on the basis of age due to his failure to present any evidence that age played a factor in the decision to deny him tenure. *See Lovelace v. Sherwin-Williams Co.*, 681 F.2d at 230, 243 (4th Cir. 1982).

Haddad also failed to present any evidence suggesting that he was discriminated against on the basis of age after he was denied tenure. Virginia Tech found a substitute professor to teach Haddad's summer 1995

course load in direct response to Haddad's letter indicating his desire to stop teaching for the summer 1995 session. The record further discloses that Haddad's complaints of promotion denials, loss of benefits, and removal from his office were all the result of his having been denied tenure and that Haddad's age had no effect on these employment actions. Accordingly, the district court properly granted summary judgment on these claims.

Haddad's final claim is that the district court erred in denying his post-trial motion to amend the judgment or for a new trial, and in granting Virginia Tech's Rule 50(b) renewed motion for judgment as a matter of law. This court reviews a denial of a Fed. R. Civ. P. 59 motion for a new trial for an abuse of discretion. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989). Judgment as a matter of law under Federal Rule of Civil Procedure 50 is proper " ' when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment.' " *Singer v. Dungan*, 45 F.3d 823, 826 (4th Cir. 1995) (quoting 5A James W. Moore, Moore's Federal Practice 50.07[21, at 50-76 (2d ed. 1994)). We review de novo the district court's decision to grant judgment as a matter of law. *See Benesh v. Amphenol Corp. (In re Wildewood Litig.)*, 52 F.3d 499, 502 (4th Cir. 1995).

The district court set aside the jury's verdict finding that Virginia Tech retaliated against Haddad by not paying him for the summer 1995 session. Although Haddad made out a prima facie case by showing that Virginia Tech refused to pay him for teaching in the summer of 1995 after he complained of age discrimination, he failed to present evidence rebutting Virginia Tech's legitimate, non-discriminatory explanation for its actions. The evidence showed that on June 1, 1995, Haddad requested that Virginia Tech find a substitute instructor to teach his summer schedule. Virginia Tech then hired a replacement instructor and paid the replacement

instructor as if he had taught the entire course. Virginia Tech offered evidence that it did not pay Haddad for the services he rendered because he broke his contract with the school b not teaching the summer session to completion. Haddad then offered no evidence to rebut Virginia Tech's pi- offered nondiscriminatory "'reason for denying Haddad wages. Accordingly, Haddad failed to meet his ultimate burden of showing that Virginia Tech had a retaliatory motive, in denying, him payment. Therefore, the district court correctly granted Virginia Tech's renewed motion for judgment as a matter of law.

We further find that the evidence in the record supports the jury's verdict entered in favor of Virginia Tech, and Haddad points to no clear error of law or manifest injustice in support of his claim that the district court erred in denying his motion to amend the judgment. Thus the district court did not abuse its discretion in denying Haddad's motion to amend the judgment or in the alternative for a new trial. *See Hutchison v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993). Finally, we find no abuse of discretion in the manner in which the district court conducted Haddad's trial.

Accordingly, we affirm the district court orders disposing of Haddad's claims. We affirm as modified the district court order entered on June 17, 1997, to reflect dismissal of Haddad's due process claims without prejudice. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED AS MODIFIED